

**No. 95301**

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**IN THE  
MISSOURI SUPREME COURT**

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**STATE OF MISSOURI EX REL.  
RYAN AMORINE,**

**Relator,**

**v.**

**THE HONORABLE KELLY PARKER,**

**Respondent,**

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**Petition for Writ of Prohibition to the Supreme Court of Missouri  
From the Circuit Court of Crawford County, Missouri  
Forty-Second Judicial Circuit, Division II  
The Honorable Kelly Parker, Judge**

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**RELATOR'S STATEMENT, BRIEF, AND ARGUMENT**

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Respectfully Submitted,

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### **Jurisdictional Statement**

In the Circuit Court of Crawford County, Cause No. 10DE-CR00849-02, Relator pled guilty to the Class C Felony of Possession of a Controlled Substance and the Class C Felony of Domestic Assault in the Second Degree. The Honorable Sanborn Ball suspended imposition of sentence and placed Relator on probation for five years on May 4, 2011.<sup>2</sup> On September 16, 2014, Relator admitted violating conditions of probation. Respondent reinstated Relator's probation and extended the term for an additional one year period. On August 18, 2015, Relator appeared and Respondent appointed the Public Defender to represent Relator and set the case for probation revocation hearing on September 22, 2015. On September 22, 2015, Respondent denied Relator's Motion to discharge Respondent from probation, allowed the State to file a Motion to Revoke Probation and set the matter for probation revocation on October 20, 2015.

Relator filed a writ with the Court of Appeals Southern District, which was denied on October 16, 2015. Relator then filed a writ with this Court on October 16, 2015. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 5; Rule 97.01.

### **Statement of Facts**

On May 4, 2011, Relator pled guilty to one count of the Class C Felony of Possession of a Controlled Substance and one count of the Class C Felony of Domestic

Assault in the Second Degree. The Hon. Sanborn Ball suspended imposition of sentence and placed Relator on supervised probation for five years. (Appendix, pp. A3-A4) On September 16, 2014, Relator admitted violating conditions of probation. Respondent reinstated Relator's probation and extended the term for an additional one year period. (Appendix, p. A5)

On January 8, 2015, Probation Officer Lindsay Farrar filed a Case Summary Report and a Field Violation Report indicating Relator had not completed community service and that he owed court costs. The reports also listed Relator's optimal discharge date as April 1, 2015 and his earned discharge date as July 13, 2015. (Appendix, pp. A5, A14-A18) On January 26, 2015, Respondent issued an order setting the case for "case review" on February 17, 2015. (Appendix, p. A5) On February 10, 2015, the State filed correspondence requesting that the case review be continued to February 18, 2015. (Appendix, p. A6)

On February 17, 2015, Relator appeared without counsel and Respondent passed the case to March 17, 2015 for setting of probation revocation hearing. On March 17, 2015, Relator appeared again without counsel and Respondent passed the case to May 19, 2015 for probation revocation hearing. On April 3, 2015, Respondent issued an Order Suspending Probation. On May 19, 2015, Respondent passed the case to June 16, 2015 for probation revocation hearing and authorized Relator to perform community service at \$7.50 per hour towards his jail board. (Appendix, p. A6)

On June 16, 2015, Relator appeared without counsel and Respondent passed the case to July 21, 2015 for probation revocation hearing. On July 21, 2015, Relator appeared without counsel and Respondent passed the case to August 18, 2015 for probation revocation hearing. On August 18, 2015, Relator appeared without counsel and Respondent appointed the Public Defender to represent Relator and further set the case for September 22, 2015 for probation revocation hearing. (Appendix, p. A7)

On September 22, 2015, Relator appeared with counsel. Counsel made an oral motion to discharge Relator from probation stating that Respondent lacked jurisdiction and/or statutory authority to revoke Relator and citing that Relator's optimal and earned discharge dates had both passed and that the State had not filed a Motion to Revoke. Counsel's Motion was heard, denied and is not reflected on the docket sheet. After denying Relator's Motion Respondent allowed the State to file a Motion to Revoke Probation and set the matter for probation revocation on October 20, 2015. (Appendix, pp. A7-A8) In response, Relator filed a writ with the Missouri Court of Appeals, Southern District, which was denied on October 16, 2015. (Appendix, p. A27) Relator then filed a writ with this Court on October 16, 2015.

### **Point Relied on – I**

**The trial court erred in denying Relator's Motion to Discharge Relator from Probation and setting the matter for a Probation Violation Hearing because Respondent no longer has jurisdiction over Relator, in that Relator's probation ended by operation of law no later than July 13, 2015, and Respondent should have**

**conducted a violation hearing within the time allowed by law or discharged Relator. The court's error deprived Relator of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.**

### **Argument – I**

**Respondent does not have jurisdiction over Relator because suspension of Relator's probation does not extend the period of Relator's Probation.**

Although absent from Respondent's Return, an argument that Relator anticipates Respondent will attempt to make is that he tolled Relator's probation by suspending it on April 3, 2015 and that, as a result, Relator's probation did not end on July 13, 2015. Nothing in section 559.036 RSMo authorizes this. Further, this argument has been made in other cases and has been rejected, most recently in *Saunders v. Bowersox*, 179 S.W.3d 288, 292 (Mo. App. S.D. 2005)(citing *State ex rel. Limback v. Gum*, 895 S.W.2d 663, 665 (Mo. App. W.D. 1995)).

### **Argument – II**

**Respondent has no authority to conduct a revocation hearing, because Relator's probation term has expired.**

Relator's probation likely expired prior to the earned discharge date of July 13, 2015. The Case Summary Report and the Field Violation Report filed by Probation and Parole stated that Relator had an Optimal Discharge Date of April 1, 2015 and an Earned

Discharge Date of July 13, 2015. These dates take into account the effect of Earned Compliance Credits. In Relator's case, no credit would have been earned in January of 2015 due to the Field Violation Report. However, Section 217.703.5 states that:

Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held. *If no hearing is held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed.* All earned credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036. Earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation, parole, or release, and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension. (Emphasis Added) (Appendix, p. A25)

In Relator's case, he should have resumed earning Earned Compliance Credit in February of 2015 and he would have earned for the month of March as well. The credit would cease again in April when his probation was suspended. Therefore, his probation likely



expired in May of 2015 making the delay in appointment of counsel and the filing of a Motion to Revoke in August and September respectively, even more egregious.

Respondent argues that Relator should not be granted earned compliance credits during the months of June 2013 through September 2014, and the months of January 2015 through present day. This argument fails based on the operation of Subsection 5 of Section 217.703 RSMo. (Appendix, p. A25) The relevant portion of Subsection 5 states:

If no hearing is held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed.

The statute clearly states that the credits begin to accrue on the first day of the next calendar month following the month in which the report was submitted or the motion was filed. The credits do not stop during the entire time a violation or motion to revoke is pending.

Respondent goes on to argue that the matter was set for a probation revocation hearing on September 16, 2014 and that “A hearing was held on that date and Respondent found that Amorine violated the terms of probation because he failed to pay court costs.” (Respondent’s Return, p. 13) This is incorrect. The matter was set for “setting of probation revocation hearing” on September 16, 2014 and on that date, while Relator appears to have made an admission, no hearing was held. Instead, Relator’s probation

was reinstated and extended for an additional 1 year period as authorized by Section 559.016 RSMo. (Appendix, p. A22) The docket entry also states “State withdraws Motion to Revoke” although there is no record that a Motion to Revoke was ever filed. (Appendix, pp. A4-A5) According to Subsection 5 of Section 217.703 RSMo., credits are only rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036. (Appendix, p. A25) Respondent argues that “Amorine could have only received earned compliance credits for the months of July 2013 through September 2014, if Respondent held no hearing at all, or if Respondent found that no violation occurred. (Respondent’s Return, p. 13) This argument fails by operation of Subsection 5 of Section 217.703 RSMo as Respondent neither revoked Relator’s probation nor did he place Relator in a department program.

Finally, Section 217.703 states that the division of probation and parole shall award earned compliance credits. Section 217.703.8 states that the award or rescission of any credits is not subject to appeal or post-conviction relief. In this case, the division of probation and parole complied with all requirements of Section 217.703 including filing case summary reports to put Respondent on notice of the exact dates that Relator’s probation could or would end. Respondent now argues that he disputes the division’s calculations. Respondent had the opportunity to dispute the division’s calculations and order a re-calculation. There is no indication in the record that Respondent ever made such a request or put Relator on notice that he disputed the division’s calculations.

### **Argument – III**

**Respondent has lost jurisdiction over Relator because neither Respondent nor the State made every reasonable effort to conduct a probation violation hearing prior to the expiration of probation or at any time thereafter that was reasonably necessary to conduct the hearing.**

Normally, the Circuit Court's jurisdictional authority to revoke probation ends when the probationary period expires. *Stelljes v. State*, 72 S.W.3d 196 (Mo. App. 2002). Section 559.036 RSMo<sup>1</sup> provides the only exception that allows a trial court to extend its statutory authority and revoke probation after its expiration date. Section 559.036.8<sup>2</sup> states that:

... the power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that (1) some affirmative manifestation of intent to conduct a revocation hearing occurs prior to the expiration of the period and (2) that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Section 559.036.8 is “complied with when, prior to the expiration of probation, some manifestation of intent to revoke is established and there is no unreasonable delay in

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<sup>1</sup> All statutory references are from RSMo Supp. 2012.

<sup>2</sup> Section 559.036 RSMo has been amended so that what was once subsection 6 is now subsection 8. Thus, many of the cases cited in this petition refer to section 559.036.6 when the present statute is 559.036.8.

conducting the revocation hearing.” *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d at 110. In Relator’s case, neither of the requirements was met to extend the Court’s statutory authority to revoke Relator’s probation.

While there is no statutory definition of what is required to manifest an intent to revoke probation, Courts have held that setting a hearing on the alleged probation violations is sufficient, as well as the State filing a Motion to Revoke Probation. *See State v. Roark*, 877 S.W.2d 678 (Mo App. S.D. 1994) and *State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. App. S.D. 2008).

In Relator’s case, while Respondent set the matter several times for “Probation Revocation Hearing,” the State had not filed a Motion to Revoke and thus there would be no motion to have a hearing on. Additionally, prior to the expiration of Relator’s probation, Respondent never inquired about the State’s intention regarding a Motion to Revoke, the State’s recommendation regarding any alleged violations or Relator’s potential need for Counsel. Furthermore, it was not until August 18, 2015 (after the probation had expired) that Respondent appointed counsel to represent Relator and it was not until September 22, 2015 (after probation had expired) that a Motion to Revoke was filed by the State. It is also significant that Relator appeared before Respondent on each date where a “Probation Revocation Hearing” was set and never once was a hearing held. The Missouri Supreme Court has previously held that “no unreasonable delay should occur in affording the probationer a hearing.” *State ex rel. Breeding v. Seay*, 244 S.W.3d at 795 (quoting *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714 (Mo banc 1977)).

Therefore, there was no affirmative manifestation of an intent to conduct a revocation hearing prior to the expiration of the period.

Relator expects Respondent will argue that this delay is reasonable because Relator never demanded a hearing be held and Relator's probation had only expired a few months prior to the new hearing date. That Relator did not demand a hearing – which would likely result in a felony conviction and possibly a prison sentence – does not cure Respondent's lack of authority over Relator's case. Respondent had the authority to schedule *and conduct* a hearing as early as January of 2015. From that point on, Respondent ignored the fact that there was no pending Motion to Revoke and continued to a pattern of setting the matter for "Probation Violation Hearing" and then continuing the matter for another "Probation Violation Hearing." There is also no indication that there were any reasonable grounds for continuing the matter such as an unavailable witness. Moreover, while Relator has the burden of showing that the trial court has not made reasonable efforts to hold the probation violation hearing before probation expires, a plain reading of section 559.036.8 clearly shows that either the State or Respondent has the burden to ensure that a hearing is conducted before the expiration of the probationary period. (Appendix, p. A21)

In this case, despite a wealth of opportunity and notice, neither the State nor Respondent has met that burden. Respondent may very well have acted with the intent to give Relator every possible opportunity to pay his costs. Unfortunately, the statute does not permit that. *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 804 (Mo. banc 2014)

### Conclusion

WHEREFORE, based on the argument in Point I of Relator's brief, Relator requests that this Court grant the Writ of Prohibition or, in the alternative, the Writ of Mandamus, requested in this cause, prohibiting Respondent from proceeding with a probation violation hearing in this case and ordering Respondent to discharge Relator.

Respectfully Submitted,

/s/ Matthew R. Miller

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## CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 11<sup>th</sup> day of December, 2015, a true and correct copy of the foregoing brief and the attached appendix were served via the efilng system to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65101, and by e-mail to Ms. Caroline Coulter, Assistant Attorney General, at caroline.coulter@ago.mo.gov and the Honorable Kelly Parker at kelly.parker@courts.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font and does not exceed the greater of 15,500 words, 1,100 lines or fifty pages. The word processing software identified that this brief contains 2,610 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

/s/ Matthew R. Miller

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